

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

19 CR 696 (PAE)

5 ARI TEMAN,

6 Defendant.

Conference

7 -----x
8 New York, N.Y.
9 November 21, 2019
2:40 p.m.

10 Before:

11 HON. PAUL A. ENGELMAYER,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 United States Attorney for the
Southern District of New York

16 BY: JACOB GUTWILLIG
Assistant United States Attorney

17 MARGULIS GELFAND

18 BY: JUSTIN K. GELFAND

-AND-

19 DiRUZZO & COMPANY

20 BY: JOSEPH A. DiRUZZO, III
Attorneys for Defendant

1 THE COURT: Good afternoon, everyone. Let me take the
2 role.

3 Who do I have for the government?

4 MR. GUTWILLIG: Good afternoon, your Honor. Jacob
5 Gutwillig for the government.

6 THE COURT: Very good. Good afternoon, Mr. Gutwillig.
7 For Mr. Teman?

8 MR. GELFAND: Good afternoon, your Honor. Justin
9 Gelfand and Joseph DiRuzzo for Mr. Teman.

10 THE COURT: And you are?

11 MR. GELFAND: Gelfand, your Honor.

12 THE COURT: And Mr. DiRuzzo?

13 MR. DiRUZZO: Right.

14 THE COURT: Good afternoon, Mr. Gelfand. Good
15 afternoon, Mr. DiRuzzo. and good afternoon to you, Mr. Teman.
16 All right.

17 I think our first order of business is to arraign the
18 defendant on the superseding indictment.

19 Just briefly, when was it returned, Mr. Gutwillig?

20 MR. GUTWILLIG: The superseding indictment was
21 returned on November 12 of this year.

22 THE COURT: All right. I'm going to arraign the
23 defendant in a moment. But when we're done with that, I'm
24 going to be asking you to explain, just to make sure I
25 understand, essentially what's being charged in each count

1 going beyond the recitation of the charging language
2 essentially.

3 I'm trying to get a better understanding of what
4 happened here or what the government's allegation is as to the
5 conduct that underlies each count. So just be prepared to do
6 that. I'll also then be taking stock with you as regards to
7 discovery.

8 With that, Mr. Gelfand, have you had an opportunity to
9 review with your client the arraignment questions?

10 MR. GELFAND: Yes, your Honor. I have.

11 THE COURT: Then let me just ask Mr. Teman to rise.

12 (Defendant sworn)

13 THE COURT: Very good. Thank you.

14 I asked you a number of questions earlier.

15 Has there been any change with respect to any medical
16 treatment that you're having or anything like that?

17 THE DEFENDANT: No, your Honor.

18 THE COURT: In the past 24 hours, have you taken any
19 drugs, medicine, or pills or drunk any alcoholic beverages?

20 THE DEFENDANT: No, your Honor.

21 THE COURT: Is your mind clear today?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: Do you understand what's happening in this
24 proceeding?

25 THE DEFENDANT: Yes, your Honor.

1 THE COURT: Mr. Gelfand, do you have any doubt about
2 your client's clarity of mind today?

3 MR. GELFAND: No, your Honor.

4 THE COURT: Mr. Teman, have you received a copy of the
5 superseding indictment, the S1 indictment?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Have you read it?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Have you consulted with your counsel about
10 it?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Do you want me to read it out loud, or do
13 you waive its public reading?

14 THE DEFENDANT: I waive it, your Honor.

15 THE COURT: Thank you very much.

16 How do you plead to the charges?

17 THE DEFENDANT: Not guilty.

18 THE COURT: Thank you. You may be seated.

19 All right. Having taken care of the arraignment, let
20 me ask government counsel to, in as much detail as you can --
21 there are four charges here. Tell me about them and the
22 conduct on which they are based.

23 MR. GUTWILLIG: Yes, your Honor. So the first count
24 in the superseding indictment is the same as the first count in
25 the original indictment. The conduct underlying that briefly

1 is what the government alleges is that Mr. Teman in
2 approximately April of this year went into a branch of a
3 financial institution and deposited approximately 27 fraudulent
4 checks.

5 The checks were written on behalf of three entities,
6 and they were deposited into an account, the GateGuard account,
7 which the government believes is owned and operated by
8 Mr. Teman.

9 Subsequently, certain of those funds were transferred
10 to a second account the government believes is owned or
11 operated by Mr. Teman. The Friend or Fraud account.

12 THE COURT: The Friend or Fraud?

13 MR. GUTWILLIG: That's correct.

14 THE COURT: Is it really called "Fraud"?

15 MR. GUTWILLIG: I believe the account is for the
16 Friend or Fraud which my understanding is a business startup by
17 Mr. Teman.

18 THE COURT: Okay.

19 MR. GUTWILLIG: At any rate, certain of those funds
20 initially deposited into the GateGuard account were
21 subsequently transferred into the Friend or Fraud account and
22 into another account associated with Mr. Teman.

23 Later -- I think it was in approximately late May, or
24 it could have been early June. I think it's late May --
25 Mr. Teman went to a branch of a financial institution located

1 here in Manhattan and made a withdrawal from one of those
2 accounts certain of the funds.

3 So in the government's view, this is, for lack of a
4 better term, the first scheme -- the bank fraud on the
5 financial institution, depositing these checks which the
6 government's position is Mr. Teman did not have authorization
7 from those entities to deposit which were deposited into one of
8 his accounts, moved around, some of them were withdrawn.

9 THE COURT: Let's pause on that.

10 Does that capture essentially the conduct underlying
11 Count One?

12 MR. GUTWILLIG: That's correct.

13 THE COURT: Just so I understand what the allegation
14 is as to what makes this fraudulent, are the checks themselves
15 the checks, if you will, of the account holder, or are the
16 checks themselves, putting aside any writing on them,
17 fabricated?

18 MR. GUTWILLIG: My understanding is that the checks
19 are themselves fabricated.

20 THE COURT: Okay.

21 MR. GUTWILLIG: In the checks, typically, as I
22 understand it, a check would have in the bottom right-hand
23 corner the signature of the individual depositing it or
24 something like that.

25 These checks say -- I'm paraphrasing here -- this is a

1 legal check. It must be deposited to GateGuard, and then the
2 phone number.

3 And the checks are issued on behalf of these three
4 entities who maintain that although I believe at least two, and
5 I think perhaps all three of them had -- and we've produced
6 statements from these entities from the individuals who worked
7 there early to the defense -- ceased there business operations
8 with Mr. Teman at that point and not given permission for him
9 to draw on their accounts which he did through these checks.

10 THE COURT: What is the name of the entity or entities
11 on whose account the original wave of checks, the 27, are
12 drawn?

13 MR. GUTWILLIG: So there are three entities. One
14 is -- let me just make sure I get them correct. I believe one
15 is called -- if your Honor will just bear with me for a moment.

16 THE COURT: Take your time.

17 MR. GUTWILLIG: One is called ABJ Lenox LLC. One is
18 called ABJ Milano, LLC. And one is called -- I believe it's
19 405 West Realty or Coney Realty.

20 THE COURT: You began to describe this at the last
21 conference, and forgive me for not remembering.

22 Does he have some affiliation, employment, contract,
23 or does he have some association with one or all of those
24 entities?

25 MR. GUTWILLIG: So this is, as I understand it, the

1 crux of the dispute between the parties which is, as I
2 understand it, Mr. Teman believes that he had a contract with
3 each of these entities or a contract or some sort of terms of
4 service that was agreed to at some point that authorized him to
5 draw on their accounts in the event that he believed that they
6 owed him money, not artfully phrased. But as I understand it,
7 terms of service.

8 THE COURT: He has some contractual relationship that
9 somehow -- the allegation or the defense is that he had some
10 permission to do something that under some circumstances
11 results in the withdrawal of money.

12 MR. GUTWILLIG: And the government's position is that,
13 first off, I'm not even sure if there is a contract. If there
14 is, if its enforceable. Even if it were enforceable, I don't
15 think you can authorize -- the government's position would be
16 that one cannot authorize you to essentially draw on their
17 account, unless you're an authorized signatory or something
18 else on the account.

19 THE COURT: Speak into the mike a little more.

20 I think it would be well worth your running to ground
21 what the account holder says because there are important
22 distinctions to be mindful here between the civil and the
23 criminal law.

24 MR. GUTWILLIG: And the account holders say that he
25 was not authorized to do this. I understand that there is also

1 not necessarily -- not the same conduct here, but I understand
2 that there is a pending civil suit against Mr. Teman here in
3 Manhattan Supreme Court that is different conduct but related
4 to the same contracts.

5 The government's position is that this is not a
6 business dispute. This is a bank fraud.

7 THE COURT: Right. But in other words, from your
8 perspective, he literally himself or somebody at his direction
9 or somebody who he's affiliated with manufacturers the actual
10 thing we're calling a check. It was not a pre-existing check
11 belonging to the account holder, number one.

12 Number two, the directive or statement on the check,
13 to wit, that the account holder authorizes the withdrawal to a
14 payee of a designated sum, is also a false representation that
15 the account holder gave that direction.

16 MR. GUTWILLIG: Yes.

17 THE COURT: Okay. When we spoke before, there was an
18 issue that I had raised that I had a curiosity about involving
19 venue. If memory serves, that first transaction with the
20 deposit of the 27 fraudulent checks I think occurred in a
21 different state.

22 MR. GUTWILLIG: That's correct.

23 THE COURT: Walk me through the venue issue, the
24 locations here.

25 MR. GUTWILLIG: So the deposit occurred in the

1 Southern District of Florida, the physical deposit I should
2 say. In the government's view, in the first instance, the
3 account, the GateGuard business, is based in New York.

4 THE COURT: Sorry. The account?

5 MR. GUTWILLIG: The GateGuard account and the Friend
6 or Fraud account.

7 THE COURT: That's the account into which the 27
8 checks are in the first instance deposited.

9 MR. GUTWILLIG: Into the GateGuard account.

10 THE COURT: So Mr. Teman's account, if you will --
11 it's presumably a nationwide bank. But his account is in
12 New York.

13 MR. GUTWILLIG: My understanding is that the business
14 account is in New York. Second, with respect to the completion
15 of the first scheme or the bank fraud, as it were, Mr. Teman
16 then goes to New York and, here in the Southern District of New
17 York, withdraws funds from one of these accounts.

18 And even if your Honor were not inclined -- the venue
19 argument on the first piece, that the accounts and business are
20 based in New York, the second that he then comes to New York
21 and then withdrawals from one of these accounts certain of the
22 proceeds of one of these checks.

23 THE COURT: May I ask you. I raised this last time,
24 but I remain concerned about it.

25 I assume that there will be at some point an argument

1 to me that the bank fraud is completed when, on false
2 pretenses, the money is removed from the victim account and put
3 into the GateGuard account.

4 And whatever else happens to it afterwards may be
5 money laundering. It may be three other federal offenses, but
6 it's not bank fraud. That is just a transfer of money. It's a
7 transaction using the fruits of a completed bank fraud.

8 Have you consulted with appeals to make sure that your
9 theory about why this is an ongoing act of bank fraud as
10 opposed to a financial transaction involving a specified
11 unlawful activity but a completed bank fraud is incorrect?

12 MR. GUTWILLIG: I consulted with appeals regarding
13 both the multiplicity issue your Honor had raised and also with
14 respect to money laundering or potential other charges. The
15 view is that the bank fraud is of a piece all together going
16 first to the transfer and then the withdrawing.

17 Even in the first instance, that the depositing into
18 those accounts that are based in New York would serve as venue
19 here. I'm happy to go back to appeals on that specific point.

20 THE COURT: That point -- I thought I had been clear
21 in raising it. The multiplicity is a separate issue.

22 But on the venue issue, I have no interest in
23 presiding over a trial where there is a spottable and
24 presumably curable legal deficiency which can be spotted at the
25 first and second conferences.

1 But my worry here is that -- and I haven't researched
2 this, but I have some familiarity with bank fraud -- there is a
3 nonfrivolous argument that the bank fraud itself is complete
4 when the financial institution that was the custodian of the
5 money parts with it and the money plops down in the defendant's
6 account.

7 Whatever else happens to the money thereafter could be
8 charged in other ways presumably but that it's no longer a bank
9 fraud. It's simply a transaction with the fruits of a
10 completed bank fraud.

11 Has that precise question been vetted by the
12 government?

13 MR. GUTWILLIG: I of course consulted with my
14 supervisor before charging and the superseding indictment on
15 venue and other points. As to that specific question, whether
16 it was completed, I will go back.

17 THE COURT: You need to because I think it's a
18 substantial question. And the thrust of what you're trying to
19 allege here I understand, but I think you need to be absolutely
20 sure that that actually squares with bank fraud.

21 Presumably, the financial institution that you're
22 claiming was defrauded is the financial institution that housed
23 the victims' money, not the financial institution into which
24 the defendant held his money.

25 Correct?

1 MR. GUTWILLIG: I think the allegation is as to --
2 yes. I suppose that would be it. The way that it's currently
3 conceived though is that the financial institution that he
4 deposited these checks into is the one upon which the fraud is
5 being perpetrated.

6 THE COURT: I see.

7 Why is that? Why is the depositing institution as
8 opposed to the surrendering institution the victim of the bank
9 fraud?

10 MR. GUTWILLIG: I suppose it could be done either way,
11 but the checks are being deposited, and he's getting credit
12 into his account for funds that are not his.

13 I take your Honor's point that perhaps the fraud is on
14 the institution as to which the money is coming rather than the
15 institution which accepts the money into his account.

16 THE COURT: He goes into a branch of his bank in
17 Florida and presents a check drawn on an account in Florida of
18 the victim.

19 MR. GUTWILLIG: Drawn on an account in Florida of the
20 victim. In terms of -- the three entities are based here from
21 which the funds were drawn. The three entities -- ABJ Milano,
22 ABJ Lenox and Coney Realty -- are all New York based, not
23 Florida based.

24 THE COURT: And their bank is where?

25 MR. GUTWILLIG: Their bank is I believe it's either

1 JPMorgan Chase or in one of the cases Signature Bank.

2 THE COURT: The issue I'm having is I'm having a
3 little difficulty pinning down, and it may be that you're
4 saying it clearly, and I'm not getting it. But it may be
5 otherwise.

6 Which bank is the victim here? Usually, but not
7 always, in a bad check case the victim is usually conceived as
8 that as the institution that parts with the money for obvious
9 reasons.

10 And the premise is that you're representing to that
11 bank that the directive being given to it, the check which
12 conveys an implicit or explicit message of authorization by the
13 account holder, is in fact an actual message on behalf of the
14 account holder. It's a direction from the account holder.

15 So if the check is forged, it's usually conceived of
16 as a false representation to the custodial bank that the
17 account holder has directed the withdrawal of those funds.

18 You're offering a different theory which is that the
19 bank into which the money will flow from -- ultimately the
20 victim bank is also itself, in some sense, a victim.

21 Having thought about that one, I want to make sure
22 that you've got legal authority for the particular way you
23 framed this and that you're in a position to articulate clearly
24 to me and to the other table the theory here as to what bank or
25 banks are being charged as the victim here.

1 This is tricky stuff. I bumped into tricky bank fraud
2 issues along not the same lines but similar ones when I was in
3 general crimes 30 springs ago. I remember what a mess this can
4 be.

5 I want to make sure that -- we're still early in the
6 case -- we have clarity in the formulation of the indictment so
7 we don't wind up with some hiccup later on.

8 MR. GUTWILLIG: Yes, your Honor.

9 THE COURT: But right now, as you understand it, the
10 scheme which says to obtain monies, funds, credits, etc., is
11 not actually directed -- as you understand Count One, it's not
12 alleging that the custodial bank, the victims' bank, is the
13 bank that is defrauded.

14 But, rather, it's the defendant's own bank that stands
15 to take in money based on a false statement made to the other
16 bank, please release the money. Its release has been
17 authorized by the account holder.

18 MR. GUTWILLIG: So that is the conception under which
19 Count One is charged. That said, the way that the indictment
20 is framed, if the victims are conceived of as the custodial
21 banks in the first instance, I'm not sure if that changes the
22 actual charge with respect to Count One.

23 THE COURT: The problem is though that you can't
24 reformulate the charge after the indictment. In other words,
25 the defense will surely ask for particularization, if you

1 haven't given it already.

2 While there are very strong limits to what is a proper
3 subject of particulars, I'd be surprised if they weren't
4 entitled to the identification of the bank, that is, the
5 victim.

6 MR. GUTWILLIG: So to that point, all of the images of
7 the checks have been produced.

8 THE COURT: Right.

9 MR. GUTWILLIG: So with respect to that, certainly the
10 government has no problem identifying which banks those
11 accounts were held at and, indeed, has subpoenaed additional
12 records from those banks in order to be able to produce them to
13 the defense.

14 THE COURT: That's all fine. The issue is really what
15 the charge connotes. I'm a little uncertain as to what you're
16 saying the charge is. I think that you're saying that the bank
17 here that is the subject of the bank fraud is Mr. Teman's bank,
18 not ABJ's bank.

19 MR. GUTWILLIG: That is how I have conceived it.
20 However, I take your Honor's point and will run to ground
21 whether the victim formulation of which institution, depositor
22 institution, is correct.

23 THE COURT: We have a trial in two months. The
24 underlying facts are not likely to change if you wind up
25 superseding to correct any misstep here, if there is one. I'm

1 not saying there is or isn't.

2 But there is a related sequence of issues here that
3 needs closer attention. One is who is the bank being
4 victimized. More to the point is the theory of prosecution one
5 that is captured by bank fraud.

6 And then there's a related issue involving venue which
7 is essentially if the money leaves -- if the bank that is
8 victimized is ultimately the ABJ bank, how is that bank fraud
9 not completed once the money lands in the next bank over which
10 appears not to be in New York.

11 If the victim is the defendant's bank, what's the
12 extra victimization between -- and if that theory is even
13 viable, what's the extra victimization that occurs that's
14 covered by the bank fraud statute when Mr. Teman takes money
15 that by that point is in his account and switches it to another
16 account.

17 That sounds like a financial transaction involving
18 specified unlawful activity, 1957. It doesn't sound like 1344
19 to me. You'll need to run that to ground, but I'm officially
20 concerned about it. So let's nail that down.

21 MR. GUTWILLIG: Sure.

22 THE COURT: So that's the theory of bank fraud. And
23 it picks up all 27 checks.

24 MR. GUTWILLIG: It picks up the first 27 checks.

25 THE COURT: And the 27 checks there I take it are

1 properly, from the government's perspective, compressed into
2 one count because essentially they're birds of a feather -- the
3 same defendant, the same scheme, the same victim, and the three
4 companies are essentially corporate affiliates.

5 So there is no need to break those out into separate
6 counts?

7 MR. GUTWILLIG: That is correct, except as to the last
8 point, my understanding is that two of the companies are
9 affiliates and one is a separate company.

10 So ABJ Lenox and ABJ Milano it is my understanding are
11 operated by the same company. Coney Realty, to my
12 understanding, is separate. However, as your Honor said, the
13 scheme or all together happened at the same time at the same
14 place with the group of checks.

15 THE COURT: So what would the instruction to the jury
16 be if hypothetically they found that, for whatever reason,
17 there was no liability as to the ABJ entities but there was as
18 to the third entity, Realty?

19 MR. GUTWILLIG: Coney Realty I think.

20 THE COURT: Coney, C-o-n-e-y?

21 MR. GUTWILLIG: C-o-n-e-y.

22 THE COURT: What happens then?

23 MR. GUTWILLIG: This is the issue I raised with
24 appeals. My understanding -- and I spoke briefly with defense
25 counsel about whether there was multiplicity or duplicity,

1 whichever one it would be.

2 I suppose, taking a step back, it relates to
3 your Honor's first question with respect to who are the actual
4 victim banks. And to your Honor's point, if it were conceived
5 of that way, then there could potentially be an issue as to
6 finding liability as to two but not the third.

7 So the government will have to go back and look at
8 that with respect to multiplicity. The multiplicity issue has
9 been flagged for appeals and has been talked through. I'm
10 happy to go back.

11 THE COURT: We'll get to this a little later. I
12 understand there will be motion practice here. It may be to
13 the extent I have been unclear about the concerns I have about
14 various charging infirmities that are possibly present. It may
15 be that the defense will conceive of this in a different way or
16 whatnot.

17 I'm just eager to not slow us up by a completely
18 foreseeable issue. But if that were the case, presumably you
19 would then seek to supersede to avoid these problems.

20 In a situation where you've got multiple victims
21 covered by parallel schemes, there may be wisdom in the
22 government's considering what value there is in pressing them
23 into the same count. I'm just saying.

24 So what's Count Two?

25 MR. GUTWILLIG: Count Two is -- so earlier in

1 approximately March of 2019, the government alleges that
2 Mr. Teman deposited two additional checks via mobile deposit
3 into the same financial institution, also into the GateGuard
4 account.

5 Those two checks were issued -- this is one on behalf
6 of the first entity -- I'm sorry. The third entity I mentioned
7 earlier, Coney Realty, and a second check on behalf of a fourth
8 entity which is a new victim as it were.

9 THE COURT: A new what?

10 MR. GUTWILLIG: A new entity. So the first three
11 entities, the earlier fraud, which is captured by Count Two, is
12 on the basis of two checks that were deposited mobily, one from
13 entity three and one from entity four which has not been
14 mentioned earlier.

15 THE COURT: Sorry. These are independent of the 27
16 checks?

17 MR. GUTWILLIG: They're independent of the 27, but one
18 of the two was ostensibly issued by one of the entities from
19 the first.

20 THE COURT: One of the same victims.

21 MR. GUTWILLIG: Correct.

22 THE COURT: This is a separate bank fraud. These are
23 also, you contend, counterfeit checks. The checks themselves
24 are not what was received, if you will, by the account holder.

25 MR. GUTWILLIG: Correct. These checks differ from the

1 27 later checks in that in the bottom right-hand corner of
2 these two checks, there is a signature; whereas, in the 27
3 later checks, there is kind of a printed boilerplate of
4 something.

5 THE COURT: Right.

6 MR. GUTWILLIG: So the individuals behind these
7 accounts, the ultimate owners of these accounts it's the
8 government's contention did not sign these checks which is what
9 the basis of Counts Three and Four for aggravated identity
10 theft are based on the conduct in Count Two.

11 THE COURT: This is bank fraud. This is not
12 aggravated identity theft.

13 MR. GUTWILLIG: Count Two is bank fraud.

14 THE COURT: I'm focusing on Count Two.

15 MR. GUTWILLIG: Sure.

16 THE COURT: These are two checks in addition to the
17 27, but the manner of the alleged bank fraud is different
18 because it involves affixing an unauthorized wet signature, if
19 you will.

20 MR. GUTWILLIG: Yes. And also because these checks,
21 like the other checks, were not authorized, it's the
22 government's understanding, by the entities that issued them.

23 THE COURT: And this is a fourth victim, not one of
24 the three that you mentioned earlier.

25 MR. GUTWILLIG: The two checks have two separate

1 victims. One is one of the three I mentioned earlier, and the
2 second set was from a fourth victim.

3 THE COURT: I see.

4 Who is the fourth victim?

5 MR. GUTWILLIG: The name -- I would need to look. In
6 the superseding indictment, it's identified as victim 4. I
7 would need to find the name of the company which I don't recall
8 offhand.

9 THE COURT: By the way, what's the aggregate amount of
10 the Count One checks approximately?

11 MR. GUTWILLIG: I believe it's approximately \$260,000,
12 but I would just like to check.

13 THE COURT: I'm just trying to get a ballpark.

14 What about the Count Two checks?

15 MR. GUTWILLIG: Each of them I believe was
16 approximately \$16,000 or \$18,000.

17 THE COURT: Great. Thank you.

18 So tell me about Count Three. Forgive me. My bad.

19 Count Two, just come back to venue on this. Again,
20 it's charged as a Southern District of New York offense.

21 Where does this occur?

22 MR. GUTWILLIG: So, again, based on where the mobile
23 deposit, the IP address of the mobile deposit, we believe that
24 the device that accessed and did the mobile depositing was
25 within the Southern District of New York.

1 THE COURT: So there the defendant, the actor here, is
2 actually in the SDNY electronically directing traffic.

3 MR. GUTWILLIG: I can't say. Presumably based on the
4 IP address if he's accessing his own account, yes.

5 THE COURT: It's either he or circumstantially
6 somebody at his direction exercising his control.

7 MR. GUTWILLIG: Correct. In addition to that, again,
8 it's in the same GateGuard account in the first instance and
9 then transferred to the Friend or Fraud account.

10 Just to kind of tie this together a little bit, this
11 happened first. The government learned of this in further
12 investigation. This happened in about March of 2019.

13 So these two funds -- I believe they're each \$16,000.
14 So call it \$32,000 -- are deposited into the GateGuard account.

15 THE COURT: Which is? That's the defendant's account?

16 MR. GUTWILLIG: The defendant's account, correct.

17 THE COURT: When the defendant opened it, he opened it
18 in New York, but it's a national account like a Citibank
19 account?

20 MR. GUTWILLIG: So I have not confirmed that when he
21 opened it, he opened it in New York. That is my understanding,
22 but I don't want to represent that as a certain fact in the
23 record. The business, the GateGuard business, to which this
24 account flowed, is based in New York.

25 THE COURT: The theory of venue on Count Two is

1 essentially -- the frontline theory is the person who was
2 actually giving the electronic directive, the act of
3 presentment of the check, is doing that from an IP address in
4 this district.

5 MR. GUTWILLIG: Into a business account based in this
6 district.

7 THE COURT: It's a bank account for a business whose
8 brick-and-mortar operations may be in this district. But the
9 bank account -- you're not in a position right now to say where
10 it is.

11 MR. GUTWILLIG: Correct, although I believe it is in
12 New York, but I will confirm it.

13 THE COURT: To the extent you're relying on a separate
14 theory that the company has business operations in New York,
15 whether or not that might supply venue in civil law or
16 something else, the requirements for bank fraud are different.

17 If I run a Thai restaurant in China Town over here but
18 have a bank account in Florida, it isn't clear to me that the
19 fact -- and somebody defrauds the bank in Florida of the money
20 of the Thai restaurant, it's not obvious to me that because
21 they serve food here in New York you've got a bank fraud in
22 New York. I'd be wary about that theory, word to the wise.

23 MR. GUTWILLIG: Yes.

24 THE COURT: Tell me about Count Three.

25 MR. GUTWILLIG: So Count Three is based on one of the

1 two checks in Count Two. The signature on the check we believe
2 is not the individual who was associated with the account,
3 associated with the account holder and the ultimate owner, and
4 the same thing for Count Four.

5 THE COURT: In each of those cases, again, the venue
6 you say is clear because it's literally physically occurring
7 electronically in New York. That's where the communication
8 embedded the misappropriated identity is taking place.

9 MR. GUTWILLIG: That is my understanding, and also
10 that these companies, as I understand it, are based in New York
11 which I take your Honor's point about China Town, but yes.

12 THE COURT: An interesting question about how that
13 affects venue on aggravated identity theft. It's a different
14 offense than bank fraud. But usually the venue involves
15 something about the actus reus of the crime, not some
16 background of the victim.

17 That's the distinction between personal jurisdiction
18 in the civil sense and venue in the criminal sense. I don't
19 want to keep putting you on the spot about this, but the
20 theories of venue relating to this count I take it have been
21 vetted up the chain?

22 MR. GUTWILLIG: I have discussed the charging
23 decisions with my supervisor up the chain. I will go back and
24 address all of this.

25 THE COURT: Please do. I'm not trying to give you a

1 hard time. I'm just trying to make sure we litigate this case
2 on the merits and don't have some late-stage hiccup.

3 MR. GUTWILLIG: Yes.

4 THE COURT: Tell me, since we met at the initial
5 conference, first of all, as to the discovery identified back
6 then, was it all produced and on the time table projected?

7 MR. GUTWILLIG: Yes. I believe so. I laid out in the
8 government's status letter that we produced an initial wave of
9 discovery prior to the first status conference and then
10 followed up on November 6 with additional discovery and then
11 Wednesday with additional discovery.

12 Certain of that discovery has included -- for example,
13 we reached out to these entities -- I don't want to use the
14 word "victim" loosely but the entities from which the checks
15 were allegedly fraudulently issued.

16 And certain of the communications with Mr. Teman from
17 the people or person who runs those entities were produced
18 which is, of course, 3500 material which is not Rule 16 but has
19 been produced early.

20 And also reports, agent reports, to provide a fuller
21 picture of what's gone on here and certain of the statements
22 from those who run the entities that these checks were not
23 authorized.

24 THE COURT: All right. To what degree have you
25 obtained further discovery since the initial conference?

1 MR. GUTWILLIG: It's not been voluminous. It has been
2 some emails, some additional bank records, some agent reports.
3 There are some outstanding subpoenas. We also will of course
4 continue to reach out to these entities for any additional
5 information they may have and produce that as quickly as we
6 receive it.

7 THE COURT: Has everything that you presently have in
8 hand been produced?

9 MR. GUTWILLIG: Yes.

10 THE COURT: And I take it the representation is this
11 is not voluminous. There may be the fruits of a bank account
12 that take up a little bit of space because they're canceled
13 checks. But in the main, this is a rather limited amount of
14 discovery?

15 MR. GUTWILLIG: That's correct.

16 THE COURT: I take it, at least for now, this is not a
17 heavy email case or anything like that?

18 MR. GUTWILLIG: No. To the extent that there is
19 voluminous email traffic, I don't know. But it's not the case
20 that we've gone out and executed a search warrant on an email
21 address which will take months and months to review.

22 THE COURT: Very good.

23 Any additional searches or seizures that you have
24 become aware of or executed since the first conference?

25 MR. GUTWILLIG: No, your Honor.

1 THE COURT: Thank you. Very helpful.

2 Mr. Gelfand or Mr. DiRuzzo, who will be speaking for
3 the defense?

4 MR. GELFAND: I will be speaking, your Honor.
5 Mr. Gelfand.

6 THE COURT: Mr. Gelfand, before we start talking about
7 the details of the schedule you propose, is there anything you
8 want to raise or put on the table?

9 MR. GELFAND: No, your Honor. We appreciate the
10 discovery that's been disclosed to date. Mr. Gutwillig has
11 informed us that there are some outstanding subpoenas. That's
12 par for the course obviously.

13 THE COURT: Yes.

14 MR. GELFAND: But obviously neither he nor I know
15 right now what that's going to entail in terms of what the
16 government is going to get.

17 THE COURT: Right. As to discovery, every indication
18 is that this is a very manageable case in terms of the volume
19 of discovery.

20 MR. GELFAND: Yes, your Honor. Having prosecuted and
21 defended white-collar cases throughout my career, I will tell
22 you that it's the least amount of discovery I've ever seen in a
23 white-collar case.

24 THE COURT: May I ask you this question. I don't
25 purport to understand the business or other relationship that

1 Mr. Teman and the people who are alleged to have been his
2 business victims. Put aside the bank victims but the folks
3 associated with let's say the 27 checks.

4 I don't purport to understand what that is. But is
5 that going to be part of the narrative of this case,
6 essentially the relationship or dealings between Mr. Teman and
7 the people whose accounts the money comes from?

8 MR. GELFAND: Yes, your Honor.

9 THE COURT: Do you have the documentation that you
10 ultimately will want or need to adequately vet whatever
11 theories you have about how that relationship bears on issues
12 like authorization here?

13 MR. GELFAND: Yes, your Honor, with one brief caveat,
14 and that's that we do intend to issue a handful of defense
15 subpoenas to supplement our theory, depending on what's
16 returned. However, we do have sufficient documentation to
17 support what we anticipate will be one of our theories of
18 defense.

19 THE COURT: Have you made Rule 16 discovery then to
20 the government?

21 MR. GELFAND: We have not yet, your Honor, in part,
22 because the government's discovery has been kind of an ongoing
23 disclosure.

24 THE COURT: Has the government made a Rule 16 demand
25 on you?

1 MR. GELFAND: The government has not made a formal
2 Rule 16 demand. We have maintained the discovery. We will
3 make a Rule 16 demand.

4 THE COURT: I expect you to. Just because their
5 discovery is rolling -- and it sounds like Mr. Gutwillig is
6 caught up. He likely has the caveat that there are outstanding
7 issues, but it sounds like he's caught up in his obligations.

8 Regardless of whether there's anything outstanding on
9 the government's to-do list, that's not a justification for
10 your not providing your discovery, and I will look unkindly on
11 warehousing Rule 16 discovery that the defense has that the
12 government is entitled to.

13 MR. GELFAND: And that is consistent with our
14 understanding, and we'll get on that immediately.

15 THE COURT: Please do.

16 How voluminous is the discovery presently now that
17 goes beyond what you're getting from the government?
18 For example, discovery relating to the relationship between
19 Mr. Teman and the victim entities.

20 MR. GELFAND: Less than 100 pages.

21 THE COURT: All the easier to get it provided.

22 Do you have a sense of what additional volume you
23 anticipate?

24 MR. GELFAND: We don't, your Honor. The reason why is
25 because we anticipate subpoenaing discovery. My understanding,

1 by way of background, just for the Court's benefit, is that the
2 government through law enforcement obtained certain records
3 from the "victims" who are not the financial institutions.

4 THE COURT: Right.

5 MR. GELFAND: But did not do so via a subpoena. We
6 intend to subpoena documents to more comprehensibly get a
7 better grasp on what they had.

8 THE COURT: Your perception is that not everything
9 that was potentially germane was produced in response to
10 whatever directive, informal or not, the government gave to the
11 "victims."

12 MR. GELFAND: Yes, your Honor. We take the government
13 at face value that they have.

14 THE COURT: Right.

15 MR. GELFAND: We don't believe that the "victims"
16 disclosed everything relevant.

17 THE COURT: I guess the followup is: What are we
18 talking about about volume? I have no understanding of what
19 the relationship was between Mr. Teman and the victims. But if
20 they have a long email relationship, that could be
21 transformative in terms of the quantity of paper going back and
22 forth.

23 Is that what we're looking at?

24 MR. GELFAND: We're looking at what I anticipate to be
25 email and other correspondence. And some of these

1 relationships do go back approximately one year.

2 THE COURT: How voluminous would you expect that's
3 going to be?

4 MR. GELFAND: In terms of paper volume, I would not
5 anticipate it's going to be particularly voluminous because
6 this is basically a vendor/customer relationship as opposed to,
7 for example, a professional services relationship.

8 THE COURT: I don't mean to put you on the spot. The
9 government brings the charges. You don't have to showcase your
10 defense.

11 MR. GELFAND: Sure.

12 THE COURT: With that important caveat, to the extent
13 you're able to share, I am interested in understanding, putting
14 aside the formalities of the motions which we'll get to in a
15 moment here, but on the merits here, is the theory that
16 Mr. Teman was entitled to the money and entitled to the means
17 he allegedly used to go and get it? Or that he was entitled to
18 the money and the ends justify the means? I'm trying to
19 understand what the theory is.

20 MR. GELFAND: The former, not the latter, your Honor.
21 The theory is that Mr. Teman had the authority to do what he is
22 alleged to have done. I would add on top of that that he did
23 not act with any requisite mens rea.

24 THE COURT: Right. The government alleges that the 27
25 checks, for example, were created, if you will, by Mr. Teman.

1 They were not created by the "victim" companies.

2 Stopping at that point, again, not requiring you to
3 answer, but if you're at liberty to do so, it helps me get an
4 early grasp on the case.

5 Is it the defense's view that this is an incorrect
6 factual allegation?

7 MR. GELFAND: May I just confer with my client?

8 THE COURT: Of course. Again, I'm not requiring you
9 to answer.

10 MR. GELFAND: Thank you, your Honor.

11 What I can represent to the Court is that we
12 anticipate that the evidence will show at trial that each of
13 the so-called "victim entities" -- and I put that in quotes
14 obviously -- have authorized Mr. Teman, to be more precise,
15 GateGuard, the corporate entity, through various written
16 agreements and payment terms that were, by the way, not
17 accessed by the government or recently disclosed by the
18 government until after the last status conference.

19 In other words, these are the payment terms where the
20 URL is actually listed on the alleged checks themselves. These
21 payment terms authorized the conduct that is alleged to be
22 criminal in this case.

23 THE COURT: So to be more precise, the government is
24 alleging that certain checks -- and I'm talking here about the
25 physical document -- were created by Mr. Teman.

1 If the evidence shows that that happened, the defense
2 would be that Mr. Teman was authorized to do that.

3 MR. GELFAND: Yes, your Honor.

4 THE COURT: All right. Okay. What else did you want
5 to put on the table before I start talking about scheduling
6 motions?

7 MR. GELFAND: I just wanted to highlight something.
8 Perhaps as a practical matter -- this is putting the cart
9 before the horse with respect to motions.

10 I'm not trying to pre litigate anything. But we do
11 believe, just to highlight for the Court's attention, that
12 there are significant Speedy Trial Act implications with
13 respect to when this case was initially indicted but more
14 specifically that are underscored with the government's kind of
15 evolution of the theory of the bank fraud.

16 THE COURT: Pause on this.

17 The conduct itself occurred in 2019.

18 MR. GELFAND: Yes, your Honor.

19 THE COURT: So we're not talking about a
20 constitutional speedy trial issue.

21 MR. GELFAND: Correct, your Honor.

22 THE COURT: When was the indictment returned in this
23 case?

24 MR. GELFAND: I don't have the exact dates in front of
25 me. What I can represent to your Honor with specificity --

1 THE COURT: The original indictment --

2 MR. GELFAND: It was in June.

3 THE COURT: -- that I have looks like -- the complaint
4 is dated June 20. The indictment bearing the number 696 -- the
5 indictment, September 26. I got the case soon thereafter.
6 When I had the initial conference, I certainly excluded time
7 right away.

8 How do we have a Speedy Trial Act issue?

9 MR. GELFAND: Mr. Teman was arrested on the criminal
10 complaint 98 days before the initial indictment was returned.
11 We anticipate supporting a motion to dismiss on Speedy Trial
12 Act grounds with authority that dictates that the indictment
13 has to be returned within 30 days of the arrest, which is a
14 consideration separate and apart from this Court --

15 THE COURT: Where was he arrested? Which district?

16 MR. GELFAND: He was arrested in the Southern District
17 of Florida, your Honor.

18 THE COURT: Was he then held in custody?

19 MR. GELFAND: He was, your Honor. He was arrested on
20 the afternoon of July 3 knowing that there was a federal court
21 holiday -- that was a Wednesday -- the following Thursday and
22 Friday.

23 THE COURT: Right.

24 MR. GELFAND: He was held in custody for approximately
25 five days. He appeared on Monday morning and was released

1 pursuant to I believe it was a combination of a personal
2 recognizance bond or an unsecured bond.

3 THE COURT: Right.

4 MR. GELFAND: And from the date of the arrest, there
5 were no motions pending. There were no exceptions to the
6 Speedy Trial Act at that point.

7 Our Speedy Trial Act challenge, to be very clear, has
8 nothing to do with the moment that Mr. Teman appeared in this
9 district or anything that happened thereafter. It has to do
10 with the fact that the government had 30 days to seek an
11 indictment.

12 THE COURT: In this district of course, as you know,
13 routinely more time is taken. But an order of continuance is
14 sought and obtained usually on consent from the magistrate, and
15 the time is rolled over.

16 Was anything like that sought in Florida?

17 MR. GELFAND: I was not counsel at the time.

18 THE COURT: That may be dispositive of your motion.

19 Have you looked into that?

20 MR. GELFAND: Your Honor, I have obtained the relevant
21 documents from Florida. We have obviously have not filed our
22 motion yet with the Court. We will certainly do our due
23 diligence, but I just wanted to highlight the fact --

24 THE COURT: I'm pushing you on this because I want to
25 make sure -- just as I'm pushing the government on the

1 durability of its indictment, I'm pushing you on the viability
2 of your theories.

3 None of us have an interest in wasting time on
4 something that might be a fatally flawed theory. You need to
5 run down whether there were orders of continuance because
6 whatever issues there may be with your theory, that's a biggy.

7 MR. GELFAND: What I can represent to the Court is
8 that I have reviewed the entire docket from the Southern
9 District of Florida. And there is no oral -- and there is not
10 an entry on the document or a written order of continuance.
11 What I can't represent to the Court is what was orally said in
12 court that day.

13 THE COURT: Let me ask you this question. It is
14 extremely rare, as I'm sure you know, for a Speedy Trial Act
15 violation to result in a dismissal with prejudice. The fact
16 pattern here is a very, very, very far cry from anything I've
17 seen where any dismissal would be with prejudice.

18 Let's assume, for argument's sake, that the government
19 did not indict within 30 days net of orders of continuance.

20 First of all, is it clear to you then that the remedy
21 then is dismissal, putting aside the with prejudice, of the
22 ensuing indictment?

23 MR. GELFAND: Yes, your Honor.

24 THE COURT: What about a superseder that adds charges?
25 What about that?

1 MR. GELFAND: Your Honor, I think, based on the
2 authority that I've reviewed, it turns on what the nature of
3 the additional charges are and whether they were encompassed or
4 at least arguably encompassed in the original charge in the
5 complaint.

6 THE COURT: So what would that mean for charges 3 and
7 4?

8 MR. GELFAND: Charges 3 and 4 are predicated on bank
9 fraud. It's aggravated identity theft.

10 THE COURT: Sorry. Charges 3 and 4 are based on Count
11 Two. Count Two involves two checks that were discovered later
12 on, checks 28 and 29. My understanding is that the conduct on
13 which your client was arrested and indeed originally indicted
14 was limited to checks 1 through 27.

15 So even if your theory is right and even if it gets
16 your client the windfall of knocking out hypothetically the
17 count as to checks 1 through 27, how does it knock out any
18 counts based on 28 and 29?

19 MR. GELFAND: Your Honor, we intend to brief the Court
20 based on the language that was specifically alleged in the
21 complaint, but I will represent to you that that's an issue
22 that we have considered.

23 Without conceding a position, I can see a universe
24 where the Court's analysis differs as to Counts One and Two
25 versus Counts Three and Four.

1 THE COURT: Just to cut to the chase here -- in a
2 moment, I'll ask the government for its response on this.
3 Let's assume, for argument's sake, that there was a Speedy
4 Trial Act violation in the time it took to get an indictment --
5 and one of the relevant issues here also may be the
6 intradistrict quality about this, but we'll see. Let's suppose
7 there was that issue.

8 What's the theory as to why this is a breach that is
9 with prejudice?

10 The circuit will deal with one of those every three
11 years. It's usually out of the Northern District, to be honest
12 with you. And it's usually just a hair-raising story that is
13 vastly different from anything that this looks like.

14 What's the theory as to why a dismissal would be with
15 prejudice?

16 MR. GELFAND: There are numerous factors, as it seems
17 like the Court is aware, that are required to be considered
18 within this circuit. Those factors are not limited to just the
19 amount of time that has passed. Obviously there are cases that
20 we're all familiar with where the government would wait two
21 years to indict or something ridiculous.

22 THE COURT: It's usually where the defendant has been
23 in custody for four years and nobody excludes time and everyone
24 forgets about the case. That's usually the background.

25 MR. GELFAND: Sure. But what we would submit is that

1 the legal analysis requires and certainly permits, within the
2 Court's discretion, a broader interpretation of those four
3 factors, including prejudice to the defendant. It's not
4 limited to prejudice. We do anticipate setting that out. I'm
5 certainly happy to answer any of the Court's questions.

6 THE COURT: No. Look. It's helpful to flesh this
7 out. It may result in my getting sharper papers when they come
8 in.

9 Let me turn to Mr. Gutwillig. Maybe you can quickly
10 put this to rest.

11 What was the reason why it took the time it took
12 between the appearance on July 8 in Florida and the
13 indictment --

14 the first indictment you said, Mr. Gutwillig, was
15 when? Late September?

16 MR. GUTWILLIG: September 26.

17 THE COURT: So a little under three months after the
18 date of the arrest.

19 What was the reason for that? Wasn't time excluded in
20 Florida?

21 MR. GUTWILLIG: Whether the Court down there did
22 something on the record, I don't know. The government did not
23 seek a continuance in the Southern District of Florida.

24 The government's position is that the speedy trial
25 clock for these purposes did not start to run until the

1 defendant was presented here in the Southern District of New
2 York.

3 THE COURT: Sorry. Let me just pause you on that.

4 If the defendant had been arrested in New York, you
5 would have had the clerk's office of the Southern District
6 hounding you to get an order of continuance or to get to the
7 grand jury within the 30th day. Otherwise, the case would have
8 been dismissed. That's just basic procedure.

9 Is there something different when the defendant is
10 arrested in a different district than is the one that is doing
11 the prosecuting? Or does that same requirement hold?

12 MR. GUTWILLIG: My understanding is the former. Now,
13 the government --

14 THE COURT: Sorry. The "former" meaning you can just
15 indict whenever you want after 30 days, 60 days, 90 days if
16 it's in a different district?

17 MR. GUTWILLIG: So the government will have to go back
18 and review that. I'm not going to represent that position to
19 the Court. The government's position here is that the speedy
20 trial clock began for purposes here.

21 Mr. Teman was out on bail when he appeared in this
22 district on September 6. I should note that the government
23 made repeated efforts to have him appear earlier than that and
24 that the indictment was obtained within the 30-day period after
25 September 6 here in this district.

1 THE COURT: So, in other words, from your
2 perspective -- he gets into the district when?

3 MR. GUTWILLIG: September 6 I believe.

4 THE COURT: Do you have a paper trail of the various
5 communications with the defense and perhaps with the U.S.
6 Attorney's Office in Florida or the court in Florida as to all
7 these matters?

8 MR. GUTWILLIG: With respect to?

9 THE COURT: From your perspective, the only issue that
10 you're identifying appears to be whether he was timely indicted
11 after his arrival in New York. That may well be one issue, but
12 it's not the issue that the defense is raising here.

13 The defense is saying, if he didn't get an order of
14 continuance in Florida, the case should have been dismissed
15 after the 30th day there. And they're further saying the
16 failure essentially to indict as long as you did, in the
17 absence of an order of continuance, is its own Speedy Trial Act
18 violation, however compliant you may have been later on in the
19 case, and they're saying that requires dismissal. Whether or
20 not it's with prejudice is a second-stage question.

21 Have you looked into whether there was a violation of
22 the Speedy Trial Act presented by the apparent lack of an order
23 of continuance after the 30th day after Mr. Teman's either
24 arrest or appearance in Florida?

25 MR. GUTWILLIG: I have looked into it. I need to look

1 into it more in order to represent a clear position to the
2 Court, which I expected to do after the defense flagged that
3 they would be raising this issue and making this motion. I
4 intend to, of course, oppose it.

5 THE COURT: You should oppose it only --

6 MR. GUTWILLIG: If it's meritorious.

7 THE COURT: If that position is meritorious. I have
8 to tell you, with respect, I'm a little alarmed. If it was the
9 case that the government didn't seek a continuance in Florida,
10 that would be a dramatic deviation from the procedure that
11 would be used if the case was at all times indigenous to this
12 district.

13 It may be that something fell between the cracks, and
14 it wouldn't be the first time that that happened. An order of
15 continuance violations have been committed by AUSAs in the
16 general crimes unit for many decades. I may be hypothetically
17 looking at one.

18 I'm just saying that that happens, but there's an
19 inquiry that one needs to go through in terms of what happens
20 if you don't get the OC and there is an indictment on the 30th
21 day.

22 Is it then obligatory on the defendant to move. If
23 the defendant doesn't move and remains out on bail, is there
24 something that changes because the defendant appears in
25 New York. Was he directed in Florida to appear in New York,

1 and is that part of the problem here.

2 In other words, if he was obliged to be in New York in
3 time, maybe that has some bearing. Ultimately, there is an
4 issue to chew over here.

5 MR. GUTWILLIG: Yes, your Honor.

6 THE COURT: May I ask you to, please, with great
7 urgency, dig into that. I'm concerned about that. Again,
8 before everyone spends a lot of time on this, I want to get to
9 the bottom of this, and I'm expecting to schedule it faster
10 than the one you're proposing. We'll see.

11 Go ahead.

12 MR. GELFAND: Your Honor, I wanted to represent to the
13 Court, based on one of the Court's questions, I don't think
14 this changes any of the analyses that we are raising.

15 But I do want the Court to be aware that the
16 government did, at our request, make some accommodations as to
17 delaying the date that Mr. Teman needed to physically appear in
18 the Southern District of New York. So I wanted the Court to be
19 clear. There was no gamesmanship or anything. That was a
20 practical matter.

21 THE COURT: I appreciate that. I will tell you, just
22 to be clear with you, that even if there was some technical
23 violation of the Speedy Trial Act, based on my knowledge of the
24 law, it would be startling to me, unless there are facts here
25 that are really not emerging, that the result would be a

1 windfall where Mr. Teman isn't ultimately able to face the
2 charges.

3 Let me put it a different way. You're a country mile
4 from the cases under which a Speedy Trial Act violation is with
5 prejudice, reserving for you the right to bring to bear facts I
6 haven't seen.

7 That may mean that some separate indictment needs to
8 get brought. It means maybe he's tried on the superseder, not
9 the original. I don't know. All of you need to run this to
10 ground soon.

11 MR. GELFAND: Yes, your Honor.

12 THE COURT: Let me just ask you, Mr. Gelfand. Surely
13 Mr. Teman's defense had an interest, if the government failed
14 to get an order of continuance in Florida after 30 days had
15 passed, in moving to dismiss the case.

16 Did they do that?

17 MR. GELFAND: Your Honor, we did not move to dismiss
18 the complaint.

19 THE COURT: Right.

20 MR. GELFAND: As a practical matter, procedurally I
21 believe that were we to file a Speedy Trial Act motion pursuant
22 to whatever deadline the Court sets, it would certainly be
23 timely. Ultimately, the Court will have to rule on the merits.

24 THE COURT: What was happening? In other words, was
25 everyone expecting Mr. Teman to show up in New York and,

1 essentially, because he didn't show up in New York till
2 September 6, nobody really thought action in Florida was
3 needed?

4 In other words, everyone was waiting for him to get to
5 New York to start the action? It sort of sounds that way.

6 MR. GELFAND: I don't believe a motion in the Southern
7 District of Florida would have been procedurally proper because
8 there was no case pending there.

9 THE COURT: That's a different question. Let me try
10 it this way: When Mr. Teman was presented on July 8, was
11 anything said about his making his way to New York?

12 MR. GELFAND: With the caveat that I wasn't there, my
13 understanding is that in due course -- he presumably would have
14 been told that he had to go to New York.

15 THE COURT: Was he given a date, or did he make a
16 commitment to get to New York?

17 MR. GELFAND: No, your Honor. Not that I'm aware of.

18 THE COURT: What did the judge order as to a next day
19 in the case?

20 MR. GELFAND: I don't believe there was an order,
21 your Honor.

22 THE COURT: Somebody needs to order presumably the
23 transcript of the proceeding down there because I don't want to
24 have to rely on the memories or the secondhand accounts of
25 people who weren't there as to what happened.

1 Defense, if you're making a motion here, when you get
2 back to the office, please order the transcript on an expedited
3 basis because that's going to potentially be an important
4 source of material.

5 MR. GELFAND: Yes, your Honor.

6 THE COURT: Government, may I ask you just briefly,
7 while I realize there is research yet to be done, I appreciate
8 that your view is that all conduct in the Southern District has
9 been above board.

10 Is it your view that the Speedy Trial Act, insofar as
11 it sets deadlines involving an arrested but not indicted
12 defendant, was complied with?

13 MR. GUTWILLIG: That would be my view with the caveat
14 that if that is incorrect, the government will not take that
15 position.

16 THE COURT: So a little more research is needed.

17 MR. GUTWILLIG: I should say also that during this
18 time period, there was thought given to this issue. It's not
19 that the government just forgot to submit a request for
20 continuance.

21 Your Honor, I think the defense may be correct. We'll
22 check. If that's the case, the government's position is that
23 the remedy would still not be dismissal of the indictment here.

24 THE COURT: The remedy for Speedy Trial Act violations
25 is often dismissal. The issue is whether it's with prejudice.

1 MR. GUTWILLIG: Yes.

2 THE COURT: I'm going to ask you to get ahead of that
3 issue and take a look at what the cure would be. If dismissal
4 were the remedy but your view is that the facts did not support
5 a with-prejudice dismissal, what happens then. In other words,
6 does the superseder here cure things?

7 You just go to a new grand jury and wheel it out
8 differently and start again I'm eager to understand that, but
9 I'm eager to get our arms around this together promptly.

10 Defense, before we get to other motions, is there
11 anything else you wanted to raise?

12 MR. GELFAND: Your Honor, the only other thing I would
13 raise is the government's theory as to venue today, without
14 holding them to whatever they represent in the pleadings, seems
15 to be as to Count Two and the aggravated identity theft counts,
16 Counts Three and Four, that there was some sort of IP address
17 evidence and/or cell site location evidence, whatever it may
18 be.

19 As a practical matter -- and I've certainly been
20 guilty of this -- unless I missed something in the discovery
21 which I have reviewed in the entirety, I don't believe that we
22 have any discovery related to that. I would ask that we be
23 provided that immediately so that we can address that and
24 evaluate that with respect to our venue.

25 THE COURT: Mr. Gutwillig, has that been produced in

1 discovery?

2 MR. GUTWILLIG: The IP address is listed in the
3 spreadsheet that was produced in discovery.

4 THE COURT: There you go. Let's move on then.

5 So the proposed briefing schedule by the defense
6 anticipates motions due on the 27th of November which would be
7 Wednesday, the government's opposition due in two weeks, and
8 replies, if any, due in one week. So with respect to speedy
9 trial, that's fine. I'm happy to set that schedule.

10 Let's talk about suppression. What, if anything, are
11 you moving to suppress? Or is that just a placeholder?

12 MR. GELFAND: Your Honor, it's not a placeholder, but
13 it's also not a decision that we've firmed up. We obviously
14 don't have any intention of filing any motion with the Court
15 that we don't believe is appropriate and meritorious. I'm
16 happy to flag the issue with the Court with the understanding
17 that we need to do additional digging.

18 THE COURT: The reason why I'm asking is because
19 suppression motions may or may not entail factual hearings.
20 Therefore, the schedule may -- right now, depending on what
21 you're telling me, I may want to ask you to reserve a date for
22 a factual hearing. Or maybe you're envisioning a suppression
23 motion that can be handled on the papers. So tell me about it.

24 MR. GELFAND: If I could flag the issue for the Court.
25 When Mr. Teman was arrested in the Southern District of Florida

1 on the complaint in this case. Certain items were seized from
2 the place that he was arrested, in particular -- and this is
3 where the rub is -- the items were allegedly in plain view.

4 Putting that issue aside for a second, they were
5 seized by an NYPD police officer detective who was physically
6 present with deputy United States Marshals and, as I understand
7 it -- I'm calling them Miami police, whatever the law
8 enforcement entity is, the local law enforcement down in
9 Florida.

10 I believe that the theory is that they were seized
11 incident to the arrest in plain view by the NYPD officer
12 executing the arrest. We believe that that raises, at a
13 minimum, a significant question about whether the NYPD
14 detective had the jurisdiction in the first place to execute
15 the arrest and, therefore, whether the exceptions to the
16 warrant requirement, because there's no dispute this was
17 without a warrant, whether the exceptions to the warrant
18 requirement would apply. Based on the very narrow somewhat
19 legal issue, your Honor, it's quasi legal/quasi factual about
20 whether the NYPD was acting outside of his jurisdiction.

21 THE COURT: He's accompanied though by other officers
22 who are within their jurisdiction?

23 MR. GELFAND: Based on the discovery, yes, your Honor.

24 THE COURT: Why would the remedy be suppression? In
25 other words, if the other officers were also validly on the

1 premises, from a perspective of inevitable discovery, if it's
2 in plain view, if you assume away the invalidity, you've just
3 got some authorized person on the team.

4 Why does the Fourth Amendment give your client that
5 windfall?

6 MR. GELFAND: Because the seizure itself was executed
7 by NYPD. To the extent that the government would ultimately
8 argue some sort of inevitable discovery type exception --

9 THE COURT: I think I just made that.

10 MR. GELFAND: -- which the government, if they were
11 already, going to argue inevitable discovery as a practical
12 matter, I think that requires further analysis.

13 THE COURT: Let me ask you a question: Are you aware
14 of any case in which, from a Fourth Amendment perspective, the
15 inclusion on a team of a law enforcement officer from a
16 different district who didn't get whatever walking papers for
17 that district that may or may not have been required, that
18 results in a suppression remedy?

19 Whatever else it is, assuming that the seized items
20 were in plain view in a place in which arresting officers were
21 entitled to be, this is a new one on me. It's a little bit
22 like if the officer hadn't taken his final exam or something
23 like that. New on me that the defendant gets the benefit of
24 that.

25 Do you have a case for that?

1 MR. GELFAND: Your Honor, I do not have a case for
2 that. I want to be crystal clear. When I said that we need to
3 do further digging, I'm not suggesting that is the remedy.

4 THE COURT: You're looking into that.

5 MR. GELFAND: Correct, your Honor.

6 THE COURT: Are you assuming, or do you have reason to
7 believe that this NYPD officer had not been deputized in some
8 way to participate on the arrest team?

9 MR. GELFAND: Two reasons, your Honor: First, the
10 affidavit in support of the criminal complaint, as with any
11 affidavit that the Court is inevitably aware of, begins by
12 laying out this particular detective's credentials,
13 qualifications, so on and so forth. There is no suggestion
14 that he was a task force officer or some other federal
15 designation.

16 THE COURT: No. Crime these days, more than in years
17 past, is cross-jurisdictional. People from different districts
18 team up all the time. Thinking back, if memory serves, the
19 hurdle to get somebody deputized to help out with an operation
20 like this is not constructing the Hoover Dam. It's probably
21 about a one-minute task.

22 I'm asking you whether you have actually asked that
23 question, because it's not something that you necessarily
24 expect to be in a charging instrument or in a complaint.

25 Have you asked the government whether the officer was

1 permitted and authorized to be part of the arrest team?

2 MR. GELFAND: Specifically, no, no, your Honor. We
3 have requested, which resulted in some disclosure of additional
4 discovery two days ago -- we have requested all of the relevant
5 documents related to the seizure. To be blunt, your Honor, if
6 the government were in a position to make that representation,
7 I think it would benefit everyone.

8 THE COURT: It might moot the issue.

9 Before we get to the government's response, I think
10 you indicated at the first conference there may be more
11 conventional suppression issues.

12 Were you disputing that the things seized were in
13 plain view as opposed to in a drawer? Or am I getting this
14 confused with another case?

15 MR. GELFAND: I wasn't at the initial hearing.

16 THE COURT: Fine. Is there any other argument for
17 suppression?

18 MR. GELFAND: No, your Honor.

19 THE COURT: So the suppression issue entirely turns on
20 the officer's lawful participation on the arrest team?

21 MR. GELFAND: Yes, your Honor. We would be willing to
22 stipulate to the plain view fact as if the officer were here
23 and physically testifies.

24 THE COURT: One thing I'm not going to be litigating
25 is whether or not the seized items were in plain view. The

1 entirety of your suppression motion is about the officer's
2 station on the case.

3 MR. GELFAND: Yes, your Honor.

4 THE COURT: That's helpful.

5 Mr. Gutwillig, any insight into that?

6 MR. GUTWILLIG: I don't, your Honor. This is the
7 first I'm hearing of this.

8 THE COURT: This is the first you've heard?

9 MR. GUTWILLIG: Yes. I have not asked the officer
10 whether he was appropriately deputized.

11 With respect to the additional request for discovery,
12 an additional request for discovery was made relating to the
13 arrest earlier this week. The government had previously
14 produced the vouchers from the items seized, the photographs
15 from the seizure.

16 I believe what was produced later were the reports
17 generated by law enforcement and the officer's report of that
18 which is not, to my understanding, required to be produced at
19 this juncture, but the government did produce any relevant
20 documents.

21 THE COURT: May I suggest this. I think Mr. Gelfand
22 is being pretty clear with us that this is an issue that has
23 the capacity to go away, the suppression issue. So the sooner
24 you can nail down whatever authority he has, assuming that
25 there is authority, it sounds as if that may moot this issue.

1 If he wasn't authorized in whatever the required way,
2 we still have a separate issue which is does the Fourth
3 Amendment have anything to do with that. But we'll see. But
4 in any event, why don't you run that to ground.

5 Mr. Gelfand, I'm happy to set that same schedule for
6 the suppression motion. I don't think -- yes. You can have
7 your reply by December 18. I might as well allow you to do it.
8 The reply may be that you're backing down. We'll see.

9 Here is the question, Mr. Gelfand: Can you imagine a
10 scenario in which we need to take factual testimony on this
11 issue? Or is this realistically -- if you get an affidavit
12 that represents whatever the magic words are about
13 authorization, your client and the people on the defense team
14 are in no position to refute that.

15 Can you imagine any scenario in which there is a
16 disputed issue of fact that needs to be resolved in an
17 evidentiary hearing?

18 MR. GELFAND: Can we confer for one minute?

19 THE COURT: Yes. Go ahead.

20 (Defense counsel conferred)

21 MR. GELFAND: Thank you, your Honor.

22 THE COURT: Yes.

23 MR. GELFAND: I think that what we would see is if --
24 and I'm going to try to be very precise. If the government
25 hypothetically were to provide us an evidentiary basis that

1 basically says he was deputized. He acted under this
2 authority. Here is the document that supports it, if there's a
3 document or something like that, I do not anticipate a world
4 where we would request or need factual findings based on
5 evidence in court by the Court about that.

6 But until we know what the government is basically
7 basing that assertion on, it's a tough question to answer. So
8 I don't want to waive any rights, but I don't anticipate the
9 likelihood of an evidentiary hearing.

10 THE COURT: Look. I need to set a hearing date just
11 because trial is close enough that if there is an issue, you're
12 ready to go.

13 One moment.

14 (Pause)

15 THE COURT: Counsel, I think we already have a
16 conference scheduled for 10:30 a.m. that day. We'll try to
17 preserve a lot of our time that day as needed.

18 We'll use that conference. If, heaven forbid, this
19 becomes a disputed factual issue, you'll need to make sure that
20 whoever the body is that is relevant to the issue is prepared
21 to testify then.

22 So, Mr. Gutwillig, that's really a government's side
23 scheduling issue. So just be mindful. That would be the date
24 of a hearing if we needed one. It's my fervent hope of all
25 things that we can moot the need for that and we can resolve it

1 on the papers.

2 Defense, I'm looking for you to be clear in any reply
3 as to whether you're comfortable with the Court resolving it on
4 the papers or whether you're retracting the motion or whether
5 you're insisting on a hearing.

6 MR. GELFAND: Absolutely, your Honor.

7 THE COURT: All right. We've taken care of speedy
8 trial and suppression. Let's turn to improper venue.

9 Defense, which counts at this point are you
10 potentially going to move against on a venue theory?

11 MR. GELFAND: Your Honor, our initial intention was to
12 move against all counts on the venue theory. I do want to go
13 back with respect to the IP address evidence. That I need to
14 look more into and evaluate the impact that that has on Counts
15 Two, Three, and/or four.

16 THE COURT: Right. But as to One, you're definitely
17 intending to move as to improper venue?

18 MR. GELFAND: Yes, your Honor.

19 THE COURT: Just articulate briefly, briefly, why your
20 view is that venue is improper for a bank fraud charge on Count
21 One.

22 MR. GELFAND: Because as the Court no doubt is aware,
23 within the Second Circuit with bank fraud in a broader sense is
24 where the actual conduct comprising the crime from beginning to
25 end occurred, if there was a crime in the first place

1 obviously.

2 In this particular instance, we believe that even as
3 alleged when considered within the context of discovery -- and
4 that doesn't seem to be disputed -- all of the relevant conduct
5 occurred within the Southern District of Florida, not within
6 the Southern District of New York.

7 I agree with what the Court articulated in its
8 questions. I'm not suggesting it's a finding or a
9 determination with respect to if there was a bank fraud, the
10 bank fraud ended before there was any inter-account transfer.

11 THE COURT: May I ask you this. You should both look
12 at *United States v. Morganstern*. I think it's a 1991 case. I
13 don't remember if it's reported or not. I think it is.

14 But it picks up the authority in the area. The case
15 dealt with issues of what constitutes bank fraud. And
16 ultimately, it explains why, for example, check kiting isn't
17 bank fraud but why some false statement or misrepresentation
18 needs to be directed to the bank. But mere insufficient funds,
19 for example, are not bank fraud.

20 So the focus of that line of authority -- and I think
21 *United States v. Williams* is the Supreme Court case that
22 delineates what is bank fraud versus what is not. That's the
23 one that says check kiting isn't bank fraud. But the basic
24 idea is the bank fraud is in the false representation or
25 pretense to a bank.

1 Right now, Mr. Gutwillig represents that it's actually
2 not the depositor, the victim companies' bank, at all, that is,
3 the victim. But it is the bank that receives the fruits of the
4 money that are taken from a different bank based on false or
5 fraudulent representations made to the bank.

6 In other words, based on what Mr. Gutwillig has said,
7 I have no doubt that the Florida bank is a proper victim of the
8 bank fraud based on the conduct described. The question is
9 whether the bank that receives the fruits of that is the victim
10 of bank fraud.

11 Mr. Gutwillig, fair warning. This is a new one on me,
12 and I know bank fraud. I'm extremely worried that you are
13 going to get an unsustainable bank fraud conviction if the
14 theory is that the fruits of a completed bank fraud passed
15 through some other bank. You need to run that to ground.

16 But your premise though -- and I guess the question,
17 Mr. Gelfand, is what you're describing is really a blend of a
18 venue and a bank fraud, substantive bank fraud question.

19 Right? If Mr. Gutwillig's premise is correct that the
20 bank fraud continues as the ill-gotten gains pass through
21 different bank accounts of the defendant, eventually, when you
22 get to a New York bank account, you'll have venue. I know
23 you're calling it improper venue, but I think, for better or
24 worse, these are two halves of the same coin.

25 Am I right about that?

1 MR. GELFAND: Yes, your Honor. I would add one
2 additional consideration. And that's that -- first of all, I
3 don't believe that Mr. Gutwillig is correct on the bank fraud
4 analysis.

5 THE COURT: Right. But if you're not going to
6 litigate that and you're just going to say there's no venue,
7 I'm ultimately going to have to run to ground what the outer
8 bounds are of bank fraud here. In other words, this is a case
9 where I think the venue argument I think is inseparable from
10 the bank fraud analysis.

11 MR. GELFAND: First of all, what's currently alleged
12 in the indictment, notwithstanding what Mr. Gutwillig said the
13 theory might be, doesn't suggest that the other financial
14 institutions are the "victim" of bank fraud.

15 THE COURT: Well, I disagree. The "To Wit:" clause
16 here could be read in either way. It's a good reason why there
17 may be a need for particulars here.

18 But the "To wit:" clause here could be read to focus
19 on the depositing as opposed to the withdrawing institution.
20 The "To Wit:" clause reads: "Teman deposited counterfeit
21 checks into an account held at a particular institution."

22 It's not crystal clear what the victim is, and I think
23 we need to be. In no sense has the government returned an
24 indictment that's inconsistent with a description of same by
25 Mr. Gutwillig. The issue is really whether it's a compliant

1 indictment.

2 Here is the point: If you're going to be litigating
3 venue, I don't think you can responsibly litigate it without
4 dealing with the issue of whether this is proper bank fraud.
5 Because if Mr. Gutwillig's theory is correct, there likely is
6 proper venue. If his theory is incorrect, there likely isn't,
7 but they're two halves of the same coin.

8 MR. GELFAND: Understood.

9 THE COURT: Let me just ask you the nuts-and-bolts
10 question here. If you're right, if my suspicion is correct
11 that the only bank fraud victim on the facts as proffered is
12 the bank that surrenders control of the money, not the bank
13 who's lucky enough to have an account holder with more money,
14 if that is correct, it's not a lot of use to your client.

15 Either your client can be indicted then in Florida for
16 bank fraud or Mr. Gutwillig will come back and say, fine.
17 Count One is now called money laundering. The bank fraud in
18 Florida is the specified unlawful activity, and the 1957
19 offense involves his engaging in a financial transaction with
20 the fruits of bank fraud, at which point, you're litigating
21 exactly the same issue with one more step which is did the
22 monies show up in New York.

23 You two need to talk because in the end, to be very
24 blunt, even if I'm completely right in spotting the frailty in
25 the current indictment, which I fear is there but I'm not sure,

1 this is a fixable problem, and your client is going to wind up
2 here in substance dealing with the same problem in the
3 underlying issue.

4 The question is the process by which we get to a place
5 in which a legally secure indictment is the one that he's being
6 charged on. But in the end, on the factual proffer that
7 Mr. Gutwillig has gotten, your client is engaged in a
8 transaction in New York with the fruits of the same conduct
9 that Mr. Gutwillig calls bank fraud.

10 So if there was a bank fraud here, your client seems
11 extremely likely ultimately to be held to account for it, even
12 if it's in the context of a 1957 charge here.

13 This is all by way of there may be a value in you both
14 talking. Okay?

15 MR. GELFAND: Understood.

16 THE COURT: The schedule you've got for that is fine
17 too.

18 Then as to a bill of particulars, I do not receive
19 bill of particulars motions until counsel have met and
20 conferred and communicated in writing as to a demand for the
21 particulars and the government has had an opportunity to
22 respond. I don't know if that has happened yet.

23 Has there been a written demand by the defense of the
24 government for particulars?

25 MR. GELFAND: There was an oral conversation.

1 THE COURT: Put it in writing, and let me get the
2 response. I want to resolve that based on a written exchange
3 of communication so that I can see what was asked and what was
4 responded to. And that, in turn, will make sure that
5 Mr. Gutwillig and his colleagues can evaluate what you're
6 asking for and why.

7 On the assumption that your oral communications
8 preview what the written communications will show, what is the
9 particularization that you have sought and not gotten?

10 MR. GELFAND: The particularization that was inherent
11 in the motion we intended to file, but I think there are
12 actually more particulars. Based on what's transpired today,
13 the initial issue was a very simple issue.

14 It was a formal disclosure for record purposes that we
15 were even willing to accept under seal of the name of the two
16 alleged victims for the aggravated identity theft counts.

17 I will represent that Mr. Gutwillig has disclosed to
18 us those names. It's not like we're not aware of that.

19 THE COURT: Right.

20 MR. GELFAND: But when an indictment says victim 3 or
21 victim 4, I think for purposes of ensuring against double
22 jeopardy and certain amendments, those kind of
23 considerations --

24 THE COURT: Right. Is your concern just that
25 Mr. Gutwillig has only told you that orally?

1 MR. GELFAND: No. He has actually put that into an
2 email. Our concern is that we believe that it should be in
3 some sort of a pleading fashion.

4 THE COURT: It doesn't have to be in a pleading, but I
5 certainly understand your point that you want to preserve a
6 record of it so that three years from now, if he's charged
7 again, you're able to point to something.

8 Is it the concern that the government doesn't want to
9 put that on ECF?

10 MR. GELFAND: I don't know if that is the concern. We
11 anticipated that possible concern. That's why we said it could
12 be under seal.

13 THE COURT: All right. May I suggest. It doesn't
14 sound like the government is breaching anything as to
15 particularizations because it sounds like he's giving you the
16 very information you want. You have a legitimate interest in
17 memorializing this in a way that protects your client's
18 interest.

19 There are about five different ways I can think of off
20 the top of my head, including putting a letter on the record in
21 the case reflecting that the names of the victims are being
22 filed in a sealed document so that it's available so that there
23 is a determined way of solving this.

24 This will be a waste of my time if creative lawyers
25 can't solve this one without getting to me. So please solve

1 that problem. If that's all you got, you don't need to resolve
2 that. You just need to be agreeable.

3 MR. GELFAND: That's fair, your Honor. With respect
4 to what was said today in court, I anticipate that we're going
5 to need to have discussions about additional particularities
6 based on Counts One and Two.

7 THE COURT: Then write a letter right away to the
8 government seeking particulars. As long as the end date for
9 the reply brief is the same, I will allow the two of you -- as
10 long as you put it in writing to me, I will approve an
11 agreed-upon modification.

12 So if, for example, you need a few more days to
13 formulate your request and you want to get it to the government
14 next Friday instead of next Wednesday, whatever, as long as you
15 two agree on that, I'm fine.

16 I can see where there may be value in providing a
17 little bit of air space for that conversation, particularly if
18 Mr. Gutwillig is, you know, running facts within his office
19 about the proper formulation of the charges here.

20 I'll approve the schedule, including, as necessary,
21 reply briefs. At our final pretrial conference, I will need to
22 resolve whatever of these motions actually get made, although
23 it's my hope some will go away or some will be agreed to.

24 I need to set a due date -- I don't think I have
25 yet -- for proposed voir dire and proposed jury charges. And

1 those are also things that I take up at the final conference.

2 If the final conference is on January 10, then can I
3 have proposed voir dire and requests to charge -- I don't want
4 to mess with your holidays. Can we say Monday, January 6.

5 So January 6 for voir dire and requests to charge.
6 I'll issue an order along those lines.

7 MR. DiRUZZO: Your Honor, may I inquire as to how
8 much, if at all, leeway or ability you give counsel to
9 participate in voir dire. I've had some judges --

10 THE COURT: The answer is I adhere to the virtually
11 unitary Southern District norm, which is that I'm delighted to
12 get your questions, but I ask the questions. You don't.
13 That's a conversation for another day -- we've been here for a
14 while -- as to why I feel strongly that that results in a
15 neutral, rigorous, and efficient process.

16 MR. DiRUZZO: Okay.

17 THE COURT: A very productive conference. The main
18 takeaway, beyond my thanks to you, because you've got a number
19 of homework assignments, is really my strong admonition to the
20 government to take a look at all these questions, please, with
21 not a premise that what has been done is correct or the best
22 practice but an independent, fresh premise.

23 There is a viable case to be brought here, but I have
24 considerable worry that the indictment has completely curable
25 flaws but flaws nonetheless. And I am eager to get to the

1 bottom of the Florida speedy trial issue which also feels to me
2 like one which, if there is a problem, feels curable. But I
3 don't want to be fretting about that in the days leading up to
4 trial, and I'm sure that's the last thing all of you want to do
5 either.

6 Anything further from you, Mr. Gutwillig?

7 MR. GUTWILLIG: I would just like to note briefly for
8 your Honor --

9 THE COURT: I've excluded time through the trial I
10 believe. Correct?

11 MR. GUTWILLIG: I just wanted to flag briefly for
12 your Honor -- I've spoken about this with defense counsel and
13 also informed the Court's deputy. And certainly it doesn't
14 bear on the schedule from the government's perspective. The
15 government would be ready.

16 I would just note that I have another trial
17 January 13. So if it's not me, it will be somebody else. I
18 just wanted to let the Court know.

19 THE COURT: Fair enough. Is your other trial likely
20 to go or not?

21 MR. GUTWILLIG: I would estimate it as very likely to
22 go.

23 THE COURT: Then you should get somebody on the team
24 who is, frankly, owning these issues now rather than later.
25 It's not fair to them to pick up a hot potato.

1 MR. GUTWILLIG: And certainly that would not be my
2 intention.

3 THE COURT: I know it's not your intention, but I want
4 to make sure. It's the holidays. I want to make sure you've
5 got somebody lined up that can be held to account for the
6 charging and other decisions the government makes.

7 I won't want to hear, particularly in a case in which
8 the defense is expressing speedy trial concerns, I don't want
9 the new AUSA to come on and say, I was newly added to the case.
10 I see some issues that I felt comfortable with Mr. Gutwillig
11 on. I think more attention is needed, to which the answer will
12 be Judge Engelmayer on November 22 told Mr. Gutwillig to get
13 his trial partner chosen right away and his successor chosen
14 right away so that those issues can be cured and resolved with
15 dispatch.

16 MR. GUTWILLIG: To be clear, this has all been
17 discussed internally to ensure that something like that does
18 not happen.

19 THE COURT: Then let's have that person appear
20 promptly so I know who it is.

21 Mr. Gutwillig, my law clerk tells me I've only
22 excluded time through today.

23 Is there an application to exclude time through trial?

24 MR. GUTWILLIG: Yes, your Honor. The government would
25 move to exclude time under the Speedy Trial Act until trial to

1 continue with motion practice, producing whatever discovery may
2 continue, and pretrial preparation.

3 THE COURT: Defense, any objection to that?

4 MR. GELFAND: No objection, without waiving any prior
5 speedy trial issues.

6 THE COURT: Let me ask you, Mr. Gelfand:
7 Notwithstanding all the issues that you have raised today,
8 without telling me any more specifics, are there discussions
9 that have commenced between the parties as to the possibility
10 of a resolution here?

11 MR. GELFAND: Your Honor, what I can represent to the
12 Court is that we have thoroughly discussed that issue with our
13 client, and our client intends to proceed to trial.

14 THE COURT: Okay.

15 MR. GELFAND: Because of that, there have been very
16 few, if any, discussions with the government.

17 THE COURT: As I'm sure you're aware, at a final
18 pretrial conference, one of the things that the judge needs to
19 do is to allocute the defendant after asking the government or
20 the defense about the existence of any formal plea offers that
21 were made.

22 Of course the reason for that is to avoid issues down
23 the road, 2255s and the like, where the allegation is made that
24 a defendant was left unaware of a plea offer.

25 It sounds as if there hasn't been a formal plea offer.

1 Whatever the facts are, I'll ask you, counsel, to get together
2 beforehand and you in turn to speak with your client beforehand
3 because at that final conference, I'll ask the government for
4 its account of plea discussions, I'll ask defense counsel, and
5 then I'll ask the defendant. Heaven knows, there ought to be a
6 meeting of the minds, but I don't want anyone unprepared for
7 that.

8 MR. GELFAND: Absolutely, your Honor.

9 THE COURT: Anything further from the defense?

10 MR. DiRUZZO: Yes. Judge, I just want to make sure
11 that we comply with your personal preferences. Given that
12 we've already talked about the pending motions, I'm going to
13 assume that we don't have to file them with the Court. We just
14 go right ahead and file the motions.

15 THE COURT: Yes. You may do so. I would ask for two
16 courtesy copies of any motion and attachment to my chambers.

17 MR. DiRUZZO: Two copies?

18 THE COURT: Yes. Two copies, one for me, and one for
19 my law clerk.

20 MR. DiRUZZO: Yes, Judge. When I get back to Florida,
21 I will reach out to the Southern District of Florida
22 magistrate.

23 THE COURT: Why don't you have your office do that
24 before you get back to Florida.

25 MR. DiRUZZO: I will call my associate and see if I

1 can get him to do that. However, here is my concern, that I
2 get in the transcript request and we don't get the transcript
3 back, even on an expedited basis, before the 27th.

4 THE COURT: If you and the government speak and agree
5 on a modest extension of time, as long as the reply brief stays
6 the same, as long as you two are in agreement -- I want you to
7 be collegial about this, and I want you to set revised dates
8 that are mutually respectful -- I'm not going to have a problem
9 with a brief adjournment of those dates, particularly to
10 facilitate the transcript.

11 It may be that Mr. Gutwillig's memory of something
12 makes it clear that in some way that transcript would be
13 unhelpful. But it sure sounds to me as if it would be because
14 I am eager to understand how things were left in Florida.

15 MR. DiRUZZO: I highly doubt Mr. Gutwillig was the
16 AUSA on the case.

17 THE COURT: No. But he would surely have notes. If
18 he was speaking to a peer AUSA, the natural question is what
19 happened in magistrate's court.

20 MR. DiRUZZO: Okay.

21 THE COURT: In any event, I would ultimately like to
22 get that document. If ultimately Mr. Gutwillig says to you,
23 it's a nothing order. Nothing happened of any relevance, while
24 I will still need it, you probably want to go ahead and file
25 your brief and just get me the transcript later on when you get

1 it.

2 MR. DiRUZZO: Understood.

3 THE COURT: Nothing further from anyone?

4 MR. GELFAND: No, your Honor. Thank you.

5 THE COURT: I wish everyone a healthy and happy

6 holiday, and I look forward to seeing you in January.

7 MR. GELFAND: Thank you, your Honor.

8 (Adjourned)

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